

FAMILY COURT OF NOVA SCOTIA

Citation: A.S. v M.S., 2015 NSFC 17

Date: 2015-11-17

Docket: FWMCA-084563

Registry: Kentville, N.S.

Between:

A. S.

Applicant

v.

M. S.

Respondent

Judge: The Honourable Judge Marci Lin Melvin
Heard November 4, 2015, in Kentville, Nova Scotia
Final Written: November 17, 2015

Counsel: Nicole Mahoney, for the Applicant, A. S.
Sharon Cochrane, for the Respondent, M. S.

By the Court:

FACTS

[1] The children lived with their mother and were removed from her care when she became involved in a sexual relationship with her uncle, a convicted sex offender. The evidence was that the uncle had unsupervised contact with the children. The mother had been subject to similar trauma as a young person. The mother has been involved in various therapies and counselling and by all accounts has a good understanding of the harm in which she had placed her children. This matter has been previously adjudicated, and the Court is not going to reiterate the facts in any more detail than will be noted in the History of the Proceedings.

History of Proceedings

[2] This matter was originally before the Court on April 11, 2013, at which time the parties consented to joint custody with primary place of residence of the two children to the mother.

[3] The father made a variation application when the children were removed from the mother's care, and the matter was heard on an interim basis on September 2, 2014.

[4] The Court granted an interim varied order, based on a material change in circumstances, which gave the mother parenting time every second day for two to three hours in duration to be supervised by a third-party or through the Supervised Access Exchange Program.

[5] The matter was adjourned for a full hearing for October 30, 2014. The Court ordered an assessment be prepared pursuant to section 19 of the *Maintenance and Custody Act*, and the hearing continued on March 3, 2015.

[6] A further interim order was granted by the Court: primary care to the father and specific parenting time to the mother every Tuesday, Wednesday, and Friday from 3 p.m. until 7 p.m., and every second Saturday and Sunday from 10 a.m. until 5 p.m. The mother's parenting time was subject to conditions but the supervision provision was lifted.

[7] A further interim order was granted by the Court on April 27, 2015: affording the mother overnight parenting time every second weekend from Saturday at 10 a.m. until Sunday at 5 p.m., again subject to conditions.

[8] On June 22, 2015 the order was varied again, and the mother had specific parenting time commencing Thursday, July 2, 2015 on a two-week rotating schedule.

[9] The parties were back in Court again on August 10, 2015. The mother sought shared parenting of the children with the father. The father sought primary care.

[10] The matter was set for hearing however the parties returned to Court on September 21, 2015, as circumstances had changed yet again and the mother did not have a place to take the children. The mother had ended her relationship with a new common-law partner, indicating she recognized the potential for abuse. The Court suggested a settlement conference but the father was not interested. The Court noted an adjournment in these circumstances was in the best interests of the children, common sense and access to justice, and granted a further adjournment mindful of an early date. The matter was heard on November 4th and 5th, 2015.

ISSUES

[11] What living arrangement would be in the best interest of these children?

EVIDENCE

[12] Jennifer Wheeldon testified on behalf of the mother, having filed a report dated April 25, 2015. Counsel for the father consented to her expert status in trauma work. On cross-examination, by Ms. Mahoney, Ms. Wheeldon testified that she thought the mother did “***incredibly powerful work***” in processing her trauma. She accomplished her goals.

[13] Debbie Reimer also testified for the mother. Her report was filed on July 31, 2015. She said her sense is that things have gone well for the children and as the mother was seeking only four days more a month to go to a shared parenting arrangement, she wasn't sure why this could not have been worked out in the best interest of the children.

[14] Ms. Reimer testified as to the mother's recent new living arrangements, saying she spoke with the gentleman with whom the mother is currently living, and “he seems to be genuine”. When questioned as to why the mother isn't paying rent, Ms. Reimer testified that it is her understanding that B.R. does not need the money. Ms. Reimer further testified that she has no concerns about the mother's parenting, the only concern is with respect to her living arrangement. When cross-examined, Ms. Reimer said her information from talking to the children is they want to spend more time with their mother. When cross-examined about the incidents between the mother of the children and the father's new partner, Ms. Reimer testified that both women had “... shot barbs at each other and both need to grow up and put the children first”.

[15] B.R. testified on behalf of the applicant mother. He said the mother is living at his house and they have a platonic relationship. They share a kitchen and washroom and laundry but she has her own quarters with privacy on her half. He testified she does not pay rent. He was very good friends with his neighbour and the neighbour knew the mother of the children. B.R. testified he has a very large space in his home and he wanted to help out his neighbour's friend. He testified that the applicant mother was reluctant to take the offer and she didn't want to be in a relationship and it took a while to persuade her that there wasn't going to be a relationship he just wanted to help. He said: “...it was an opportunity to help out someone I thought deserved a break.” The Court paid careful attention to B.R. and considered his testimony at great length, as it is unfortunately unusual for people to simply want to help one

another without recompense. B.R. testified he is an artist and does high end carpentry work, he also has rental properties, and can afford to accommodate the applicant mother and her children. This includes groceries for them. It also includes transportation. The applicant mother is not paying rent at present but B.R. testified that once she was able to pay rent they would re-evaluate the situation. He said she is very helpful around the home and he hadn't expected her to clean for him but she does and he appreciates it.

[16] The applicant mother testified she's had a difficult time given everything she has gone through, and has tried to get her life together so that she can be a positive influence for her children. She was cross-examined by Ms. Mahoney with respect to not getting the children's homework done. The applicant mother testified that the father and his common-law partner pick up the book bags at school before the applicant mother takes the children and the father in the past told her not to worry about their homework. Ms. Mahoney asked her why, given that she has the children 10 days a month, does she want to have them for extra days a month. The applicant mother testified: "... because they are my kids. This has been the year from hell for me. Any kind of increase in time is important to me." The applicant mother further testified she felt, after giving it a lot of thought, that asking for primary care would be selfish, which is why she changed it to shared custody. She was visibly upset. The Court found her evidence to be credible. It was obvious that this process has been extremely difficult for her.

[17] The respondent father called his common-law partner to the stand. When cross-examined by Ms. Cochrane, she said she didn't remember telling the applicant mother: "You'd be better off dead, if I were you I'd kill myself, you don't deserve your children or your life, you were selfish, you are scum." On further cross-examination the witness testified that on the first day of school this year both she and the applicant mother apologized to one another. Her evidence is she believes they are getting along better. She further testified that the children tell her that they miss their mother and she tells them they will see her soon.

[18] The respondent father testified on his own behalf. He has very strict rules for the children, for instance they can't call their mother at bedtime. However, since September 2015, he testified he and his partner have spent a lot more time with the children and their mother together. He feels their relationship has improved. However he does not want to share the children during the school year because he believes the children should be in his primary care so they can go to school from his residence. The respondent father testified that he understood how much the children miss their mother however the thought that they may see her more is "scary" to him, as Ms. Reimer didn't seem overly conclusive with respect to the present living arrangements for the applicant mother.

ANAYLSIS

[19] The Court must first consider what is in the best interest of these children.

[20] The applicant mother has had bad luck in finding suitable intimate partners. It is clear from the evidence that she tends to jump into relationships quickly. Her relationship with her uncle was a catastrophe which continues to resonate even now in her life and those of the

children. Her relationship with her next common-law partner, with whom she and the children were supposed to be living, was less of a disaster, but a disaster none the less. The good news is that she recognized the potential for abuse with the common-law partner and extricated herself from the situation.

[21] The *Maintenance and Custody Act*, Section 18, codifies the relevant circumstances that a Court must look at when determining what is in the best interest of the children. The Court has reviewed these provisions in light of the evidence.

[22] The Court has reviewed pertinent jurisprudence including **Murphy v Hancock, 2011 NSSC 197**, and the reasoning's of O'Neil, A.C.J.

[23] The proximity of the two proposed homes is relevant to assessing how a shared parenting arrangement might impact on all aspects of a child's life, including school. The availability of each parent and step-parent and members of respective extended family is also an important consideration. Each parent's capability and motivation to ensure the children's best interest are met in a shared parenting arrangement must also be considered. O'Neil, A.C.J. also commented on a reduction in transitions so as to not give rise to further conflict between the parents, whether midweek parenting time can be structured without disrupting the child, opportunities that shared parenting provide each parent to be involved in matters pertaining to health, education, and recreation, as well as decision-making, the responsibility that shared parenting imposes on parent to make important decisions, any employment or career benefits that might occur as a result of a shared parenting arrangement or equal sharing of responsibilities, improvements in the standard of living as a result of a shared parenting arrangement, the availability and willingness of parents to share information, if primary care and limited access give rise to more conflict, and the differences in parenting styles. The Court has considered the above in relation to the case presently before it. In particular, the Court has considered the power imbalance often created by a primary care arrangement.

[24] The terms 'sole custody', 'primary care', 'shared custody', and 'access' may indeed conjure negative feelings by both participants. When this is the case, it is best not to use these words or terms. It is -after all - lives of children we all are contemplating and how those lives are best lived with the two people who hopefully love them the most: their parents. There is no room for argument or negative thoughts over the terms the Court must impose when considering children's lives. The respondent father argues that the applicant mother has not been able to provide a high-level of stability and or safety for the children. He, on the other hand has had the children in his primary care for one year. And he and his common-law partner have been in a relationship for almost four years. He has stepped up and provided stability to the children when they needed it and were not able to receive it from the applicant mother.

[25] In **Hammond v. Nelson, 2012 NSSC 27** [CanLII], Dellapina, J., reviews some of the factors a Court may consider when asked to decide if a shared parenting arrangement should be ordered over the objection of one of the parents. These factors have been considered reflective of the evidence in this case.

[26] The respondent father argues that the children have experienced a lot of changes in the past year. The applicant mother has changed her residence twice and has introduced two new men to the children's lives. His counsel argues: "Just last month, [the applicant mother] was struggling to exercise her parenting time because she did not have accommodations. Her current living situation is very new and [the applicant mother] admits she is not currently paying rent. How long will this new situation last? Will the children experience yet another upheaval in the next few months because [the applicant mother] has to move again?"

[27] The Court has considered all of the evidence in the file dating back to the original application. There have been numerous material changes in the mother's circumstances. The Court has considered what is in the children's best interest based on all of the evidence presented. There is no doubt that the applicant mother loves her children and wants to spend more time with them. There is also no doubt that the respondent father has valid concerns with respect to the living arrangements for the applicant mother.

[28] The applicant mother has found new living accommodations with a man she does not know well and she accepted - the court finds - in desperation.

[29] The man with whom she resides testified on her behalf. The Court finds that he was a credible witness and seems to be a rare individual who wants to give something back in appreciation for the good fortune he has had.

[30] The respondent father has concerns about the stability of the situation, and the Court does as well. However, the Court finds the applicant mother has proven herself to be resilient and self-sufficient and if the living arrangement with B.R. turns sour, the Court believes that the applicant mother will not put her children in danger, knowing the consequences all too well from the events of this past year. The respondent father is - after all - content with the applicant mother having parenting time in her present living situation from Friday until Sunday every second weekend and Monday to Tuesday on alternate weeks, knowing that the mother resides with B.R.. The Court finds he believes the children will be well cared for during this time. He does however want to have the children with him during school days so the children will have a regular routine during that time.

CONCLUSION

[31] The Court finds it to be in the best interests of the children, having considered all of the evidence, that the parents have parenting time as follows:

[32] In the months where there are four weekends in the month, the applicant mother will have parenting time with the children:

[33] The first weekend of every month from Saturday at 6 p.m. until Monday at 6 p.m., and the children will go to school from her residence on Monday morning or if that Monday is an in-service, holiday or a storm day, she may keep the children at home with her until Monday at 6 p.m. (Or a time mutually agreed by the parties in the event of a storm day or the roads not being cleared, taking into account the best interest of the children and their safety.)

[34] For the remaining weekends of the month, the mother will have the children from Friday after school until Monday at 6 p.m.

[35] If Friday is an in-service, holiday or a storm day, the applicant mother will have the children from 10 a.m. or a time mutually agreed upon by the parties, again taking into account if it is a storm day, the roads and weather conditions in the best interest and safety of the children.

[36] In the months when there is a fifth weekend, the respondent father will have the children on the fifth weekend, however, the mother will have the children on the Wednesday preceding that weekend, until she drops them off at school Friday morning.

[37] In 2016, therefore, the respondent father will have parenting time on the weekends of January 29, April 29, July 29, and December 30.

[38] If the respondent father has a special weekend event to which he would like to take the children, this request will not be unreasonably denied.

[39] The parties may mutually agree to any variations in the above-noted parenting time for one another.

[40] On the first weekend of every month, the respondent father will have parenting time with the children every Saturday until 6 p.m.

[41] His parenting time resumes 6 p.m. on Mondays.

[42] The parents will alternate Christmas parenting time as follows:

[43] Christmas in odd years, the applicant mother will have the children from 10 a.m. until 6 p.m. on December 24, and from 2 p.m. on December 25 until 2 p.m. on December 27. In the even years the respondent father will have the children from 10 a.m. on December 24 until 6 p.m., and on December 25 from 2 p.m. until 2 p.m. on December 27. The parents will share the remaining days of the Christmas break accordingly. Christmas parenting time supersedes regular parenting time.

[44] Parenting time during March break will be as follows:

[45] In even years the mother will have the children from Friday when school gets out until Wednesday at 12 noon and the father will have the children Wednesday at 12 noon until the children return to school on Monday morning. Conversely in odd years the father will have the children from Friday when school gets out until Wednesday at 12 noon and the mother will have the children from Wednesday at 12 noon until the children return to school on Monday morning.

[46] This parenting time supersedes all other parenting time.

[47] The parents may mutually agree to change these arrangements, if for instance one of them wishes to take the children on a trip for March break. Therefore if one parent takes the

children away on a trip for March break, the next March break the children be with the other parent for the full March break.

[48] Parenting time during Easter will be as follows: in even years the father will have the children on Good Friday and Easter Saturday until 6 p.m. The mother will have the children from Easter Saturday at 6 p.m. until Easter Monday at 6 p.m. In the odd years, the mother will have the children on Good Friday and Easter Saturday until 6 p.m. and the father will have the children Easter Saturday at 6 p.m. until Easter Monday at 6 p.m. Easter parenting time supersedes all other parenting time.

[49] The parties may mutually agree to change the terms between themselves on all stipulated parenting times, as is in the best interest of the children. The parents are to communicate respectfully and kindly with one another at all times, in the best interest of the children. If there are material changes with respect to the other parent's living conditions or situation, they are to communicate with one another with respect to these changes.

[50] The Court is encouraged with the level of communication that now exists between these parents. They have both weathered a significant storm in their children's lives and it is hoped they will be able to continue to communicate with one another.

[51] The Court will review this matter in six months and has set a date for return to determine summer parenting time for Monday, May 16th, 2016 at 9:00 a.m. If the parties have agreed to a summer parenting time schedule, a varied order may be filed and the date will be removed.

Marci Lin Melvin, J.F.C.

November 17, 2015